

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

CONFORMIS, INC.,

Plaintiff,

v.

ACACIA RESEARCH
GROUP LLC, ADVANCED SKELETAL
INNOVATIONS LLC, BONUTTI
SKELETAL INNOVATIONS LLC, and
PHILLIP MITCHELL,

Defendants.

CIVIL ACTION NO. 13-cv-10377

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff, ConforMIS, Inc. (“ConforMIS”), through its undersigned attorneys, alleges the following for its Complaint against Acacia Research Group, LLC (“Acacia Research”), Advanced Skeletal Innovations LLC (“Advanced Skeletal”), Bonutti Skeletal Innovations LLC (“Bonutti Skeletal”), and Phillip Mitchell:

THE PARTIES

1. ConforMIS is a Delaware corporation having its primary place of business at 28 Crosby Drive, Bedford, MA 01730. ConforMIS is a privately held company that has provided dramatic advancements in patient care by creating personalized, patient-specific joint implants and instrumentation. ConforMIS owns more than 250 patents and patent applications covering its award-winning innovations.

2. On information and belief, Acacia Research is a Delaware limited liability company having a place of business at 6136 Frisco Square Blvd., Suite 385, Frisco, TX 75034.

3. On information and belief, Advanced Skeletal is a Delaware limited liability company having a place of business at 6136 Frisco Square Blvd., Suite 385, Frisco, TX 75034. On information and belief, Advanced Skeletal is a wholly owned subsidiary of Acacia Research, sharing the same chief executive officer and a same place of business.

4. Bonutti Skeletal is a Delaware limited liability company having a place of business at 6136 Frisco Square Blvd., Suite 385, Frisco, TX 75034. On information and belief, Bonutti Skeletal is at least partially owned by Advanced Skeletal, sharing a same place of business.

5. On information and belief, Phillip Mitchell is Vice President of Engineering at Acacia Research, having a personal residence at 18 Phaedra, Laguna Niguel, CA 92677.

JURISDICTION AND VENUE

6. This is an action for declaratory judgment that the commercial manufacture, use, sale, offer for sale in the United States, and/or importation into the United States of ConforMIS's iUni® G2 Unicompartmental Knee Resurfacing System and its associated instruments and surgical technique have not and will not infringe any valid and enforceable claim of U.S. Patent No. 7,806,896 (the "'896 patent"). A copy of the '896 patent is attached as Exhibit A. This is also an action for breach of contract, misappropriation, unfair trade practices under Massachusetts General Law 93A, and misrepresentation.

7. This action is based upon an actual controversy between the parties concerning noninfringement and invalidity of the '896 patent and ConforMIS's continued right to commercially manufacture, use, sell, offer for sell in the United States, and/or import into the United States ConforMIS's iUni® G2 Unicompartmental Knee Resurfacing System and its associated instruments and surgical technique.

8. This Court has exclusive and/or supplemental subject matter jurisdiction over ConforMIS's declaratory judgment, contract, misappropriation of proprietary and confidential business information, unfair and deceptive trade practices, and misrepresentation claims against Acacia Research, Advanced Skeletal, Bonutti Skeletal, and Phillip Mitchell under the Patent Laws of the United States, 35 U.S.C. § 100 *et. seq.*, Massachusetts General Law 93A, and pursuant to 28 U.S.C. §§ 1331, 1332, 1367(a), 1338(a), 2201, and/or 2202. There is diversity of citizenship at least between ConforMIS and Phillip Mitchell, and the amount in controversy exceeds \$75,000.

9. This Court has personal jurisdiction over Acacia Research because, based upon information and belief, Acacia Research has direct or indirect control over the '896 patent by way of its ownership interest in Bonutti Skeletal. On information and belief, Acacia Research, by and through its subsidiaries, has brought suit in this Court, availing itself to the benefits of this forum by filing a complaint in a related civil action, *Bonutti Skeletal Innovations LLC v. DePuy Mitek, LLC.*, No. 1:12-cv-11667-RGS, which concerns at least the '896 patent. Further, Acacia Research availed itself to the benefits of this forum by participating as a party in at least the following additional civil action: *Acacia Research Group LLC v. St. Jude Medical*, No. 1:13-cv-10025-FDS. Acacia Research has further subjected itself to this Court's jurisdiction by accessing ConforMIS's online content and agreeing to Terms of Use of ConforMIS's Website, which require users, at Paragraph 30, to agree that lawsuits related to the use of the Website "be brought in the federal or state courts located in Middlesex County, Massachusetts," and that the user "submit to the exclusive personal jurisdiction of such courts for such purpose." A copy of ConforMIS's Terms of Use is attached to this complaint at Exhibit B.

10. This Court has personal jurisdiction over Advanced Skeletal because, based upon information and belief, Advanced Skeletal has direct or indirect control over the '896 patent by way of its ownership interest in Bonutti Skeletal. On information and belief, Advanced Skeletal, by and through its subsidiary Bonutti Skeletal, has brought suit in this Court, availing itself to the benefits of this forum by filing a complaint in a related civil action, *Bonutti Skeletal Innovations LLC v. DePuy Mitek, LLC.*, No. 1:12-cv-11667-RGS, which concerns at least the '896 patent.

11. This Court has personal jurisdiction over Bonutti Skeletal because Bonutti Skeletal has availed itself of the benefits of this forum by filing a complaint in a related civil action, *Bonutti Skeletal Innovations LLC v. DePuy Mitek, LLC.*, No. 1:12-cv-11667-RGS, which concerns at least the '896 patent.

12. This Court has personal jurisdiction over Phillip Mitchell because Phillip Mitchell has subjected himself to this Court's jurisdiction by accessing ConforMIS's online content and agreeing to Terms of Use of ConforMIS's Website, which require users to agree that lawsuits related to the use of the Website "be brought in the federal or state courts located in Middlesex County, Massachusetts," and that the users "submit to the exclusive personal jurisdiction of such courts for such purpose." (Ex. B. at ¶ 30.)

13. Venue as to these claims is proper in this District Court pursuant to 28 U.S.C. §§ 1391 and 1400 because it is the judicial district where a substantial part of the events or omissions giving rise to the claims occurred.

FACTUAL BACKGROUND SUPPORTING ACTUAL CONTROVERSY

14. The United States Patent and Trademark Office (the "Patent Office"), on October 5, 2010, issued the '896 patent, entitled "Knee Arthroplasty Method," to the inventor Peter M. Bonutti ("Dr. Bonutti"). The face of the '896 patent names MarcTec LLC as the assignee. (Ex. A.) On information and belief, MarcTec LLC is Dr. Bonutti's holding company.

15. Acacia Research publically represents that it, and its affiliates, partner with patent holders, such as Dr. Bonutti and Bonutti Skeletal, to turn patents into revenue through licensing and enforcing patents.

16. Phillip Mitchell has been employed and is currently employed as Acacia Research's Vice President of Engineering.

17. On information and belief, on or around May 23, 2012, Acacia Research, through its agent Phillip Mitchell, registered for and gained access to ConforMIS's Surgeon Resource Center Website and other ConforMIS online content, including ConforMIS's proprietary and confidential business information.

18. ConforMIS's Terms of Use states that "BY ACCESSING THIS WEB SITE, OR BY CLICKING A BOX THAT STATES YOU ACCEPT OR AGREE TO THESE TERMS, YOU AGREE TO THE FOLLOWING TERMS AND CONDITIONS." (Ex. B at Introduction.) The Terms of Use states that "IF YOU DO NOT AGREE, YOU HAVE NO RIGHT OR LICENSE TO ACCESS THIS WEBSITE AND YOU SHOULD NOT DO SO." (*Id.*) On information and belief, on or around May 23, 2012, Acacia Research, through its agent Phillip Mitchell, accepted the ConforMIS Website's Terms of Use by registering for ConforMIS's Surgeon Research Center and by accessing certain other of ConforMIS's online content. Therefore, on information and belief, Acacia Research, through its agent Phillip Mitchell, agreed to the Terms of Use.

19. ConforMIS's Terms of Use states that the Website "is not intended for use by any person or entity who may provide products or services that compete with any ConforMIS products and services, and is not intended for use by any User for commercial purposes whatsoever." (*Id.* at ¶ 2.) On information and belief, Phillip Mitchell and Acacia Research,

through its agent Phillip Mitchell, accepted ConforMIS's Terms of Use and elected to receive ConforMIS's proprietary and confidential business information, agreeing not to use that information for any commercial purpose.

20. ConforMIS's Terms of Use states that the Website "is provided as an information service for knee-implant patients who are customers or potential customers of ConforMIS, and their agents or representatives, as well as the physicians, CT technologists, imaging centers and related healthcare providers who take part in such patients' image-to-implant process." (*Id.*) The Terms of Use further states that "[t]o access certain portions of the Site, Users must register with ConforMIS by providing the User's name, affiliated entity/practice, name, address, email, telephone, professional credentials and other information which may be used to personally identify the User." (*Id.* at 7.)

21. ConforMIS's Terms of Use additionally states that the user agrees to "indemnify, defend and hold harmless ConforMIS, its parents, subsidiaries, affiliates, officers, directors, licensors, distributors or other partners, employees, consultants, agents, representatives and other authorized users from and against any and all third-party claims, liabilities, damages, losses, costs, expenses, fees (including reasonable attorneys' fees) that such parties may incur as a result of or arising from . . . (2) your (or anyone using your account's) use of the Site, . . . (3) your (or anyone using your account's) violation of these Terms of Use." (*Id.* at ¶ 26.)

22. Phillip Mitchell and Acacia Research, through its agent Phillip Mitchell, accepted ConforMIS's Terms of Use and gained access to certain of ConforMIS's proprietary and confidential business information by misrepresenting that it was a ConforMIS customer, a potential customer, or a physician, a CT technician, or a related healthcare provider who takes part in ConforMIS's patients' image-to-implant process.

23. By agreeing to ConforMIS's Terms of Use, Acacia Research and its agent, Phillip Mitchell, stipulated that valuable consideration was received. ConforMIS's Terms of Use expressly state that users "acknowledge that [the] Terms of Use are supported by reasonable and valuable consideration, the receipt and adequacy of which are hereby acknowledged." (*Id.* at Introduction.) Thus, on information and belief, Acacia Research and its agent Phillip Mitchell received valuable consideration, including access to information from ConforMIS's Website and other online content, in exchange for agreeing to ConforMIS's Terms of Use. On information and belief, Acacia Research and its agent, Phillip Mitchell, received valuable proprietary and confidential business information and consideration in exchange for access to ConforMIS's Website and other online content.

24. On information and belief, Acacia Research and its agent, Phillip Mitchell, used ConforMIS's proprietary and confidential business information obtained from ConforMIS's Surgeon Resource Center Website and other ConforMIS online content in connection with Acacia Research's business and/or commercial purposes, including, but not limited to, negotiations with Dr. Bonutti and/or MarcTec LLC regarding the '896 patent, and directing Bonutti Skeletal to file a patent infringement lawsuit in the District of Delaware against ConforMIS.

25. On or about June 7, 2012, ConforMIS contacted Phillip Mitchell to inform him that he was in violation of ConforMIS's Terms of Use, and ConforMIS subsequently revoked Acacia Research's and Phillip Mitchell's access to ConforMIS's Surgeon Resource Center Website and other of ConforMIS's online content.

26. On or about June 8, 2012, MarcTec LLC, Dr. Bonutti's holding company, assigned the '896 patent to Acacia Research. A copy of an assignment record of the '896 patent

from the Patent Office is attached as Exhibit C. MarcTec's assignment of the '896 patent came just days after Acacia Research and its agent Phillip Mitchell accessed ConforMIS's Surgeon Resource Center Website and obtained ConforMIS's proprietary and confidential business information.

27. On or about August 30, 2012, Acacia Research assigned the '896 patent to Acacia Research's wholly owned subsidiary, Advanced Skeletal. (*Id.*)

28. On or about August 31, 2012, Advanced Skeletal assigned the '896 patent to its at least partially owned subsidiary, Bonutti Skeletal. (*Id.*)

29. On September 10, 2012, based on information improperly and unfairly obtained by accessing proprietary and confidential business information on ConforMIS's website, Bonutti Skeletal filed a complaint against ConforMIS in the U.S. District Court for the District of Delaware asserting that ConforMIS's iUni® G2 Unicompartamental Knee Resurfacing System and its associated instruments and surgical technique infringe at least one claim of the '896 patent (the "Delaware Complaint"). A copy of Bonutti Skeletal's Delaware Complaint is attached as Exhibit D. Bonutti Skeletal's Delaware Complaint is deficient on its face pursuant to Federal Rules of Civil Procedure 8(a) and 12(b). ConforMIS did not answer the Complaint and instead moved to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) or in the alternative transfer that action to this Court.

30. Bonutti Skeletal's Delaware Complaint alleges that ConforMIS "has infringed and continues to infringe the '896 patent directly, indirectly (by inducing infringement by others or contributing to infringement), jointly, literally and/or equivalently." (Ex. D at ¶ 17.)

31. On information and belief, Acacia Research and Advanced Skeletal caused Bonutti Skeletal to file a complaint against ConforMIS in the District Court of Delaware.

32. Based on Bonutti Skeletal's facially deficient Delaware Complaint against ConforMIS involving the '896 patent and ConforMIS's ongoing sale and manufacturer of the iUni® G2 Unicompartmental Knee Resurfacing System and its associated instruments and surgical technique, an actual and justiciable controversy exists between the Defendants, Acacia Research, Advanced Skeletal, and Bonutti Skeletal, and Plaintiff, ConforMIS, regarding noninfringement and invalidity of the '896 patent.

COUNT I
(Declaratory Judgment of Noninfringement of the '896 Patent Under 35 U.S.C. § 271)
(Against Acacia Research, Advanced Skeletal, and Bonutti Skeletal)

33. ConforMIS incorporates the preceding paragraphs as if fully set forth herein.

34. On information and belief, Acacia Research and/or Advanced Skeletal have direction and control over Bonutti Skeletal, direct and control Bonutti Skeletal's patent infringement lawsuits, and fund patent infringement litigation, including the litigation commenced by Bonutti Skeletal's Delaware Complaint and the litigation Bonutti commenced against DePuy Mitek, LLC, DePuy Institute LLC, Depuy, Inc., and Depuy Orthopaedics, Inc. in this Court.

35. Direct infringement under 35 U.S.C. § 271(a) requires that a party, without authorization, make, use, offer to sell or sell any patented invention within the United States, or import into the United States any patented invention during the term of a patent. Direct infringement of a method claim requires that a party perform each and every step of the method.

36. The '896 patent consists entirely of method claims. ConforMIS does not practice each and every step of any claim of the '896 patent. Accordingly, ConforMIS has not directly infringed, and does not currently directly infringe, any valid and enforceable claim of the '896 patent.

37. Indirect infringement of a method claim under 35 U.S.C. § 271(b) requires that a party instruct or induce another to perform some method or process, or manufacture some product, with actual knowledge and specific intent that the induced act infringes a third-party's patent rights, or with willful blindness thereof.

38. The '896 patent consists entirely of method claims. ConforMIS has not and does not induce another to perform each and every step of any claim of the '896 patent. Further, ConforMIS does not have actual knowledge and specific intent to induce others to infringe the method claims of the '896 patent. Accordingly, ConforMIS has not induced, and does not currently induce, any infringement of any valid and enforceable claim of the '896 patent.

39. ConforMIS has not jointly infringed, and does not currently jointly infringe, any valid and enforceable claim of the '896 patent.

40. Contributory infringement of a method claim under 35 U.S.C. § 271(c) requires that a party sell or import a component or apparatus, for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial non-infringing use.

41. ConforMIS has not contributorily infringed, and does not currently contributorily infringe, any valid and enforceable claims of the '896 patent.

42. Upon information and belief, Bonutti Skeletal filed the Delaware Complaint by and through, and as an agent of, its owners Acacia Research and Advanced Skeletal. Accordingly, there exists an actual controversy between Bonutti Skeletal, Acacia Research, and Advanced Skeletal on the one hand, and ConforMIS on the other, regarding whether the iUni® G2 Unicompartmental Knee Resurfacing System and its associated instruments and surgical

technique infringes any valid and enforceable claim of the '896 patent, and a judicial declaration of non-infringement is necessary and appropriate at this time pursuant to 28 U.S.C. §§ 2201 and 2202.

COUNT II
(Declaratory Judgment of Invalidity of the '896 Patent)
(Against Acacia Research, Advanced Skeletal, and Bonutti Skeletal)

43. ConforMIS incorporates the preceding paragraphs as if fully set forth herein.

44. The '896 patent and each of the claims thereof are invalid for failure to comply with one or more conditions for patentability set forth in one or more provisions of 35 U.S.C. §§ 101, 102, 103 and/or 112, or under other judicially created bases for invalidation.

45. There exists an actual controversy between Bonutti Skeletal, its owners, Acacia Research and Advanced Skeletal, and ConforMIS regarding the validity of the '896 patent, and a judicial declaration of invalidity is necessary and appropriate at this time pursuant to 28 U.S.C. §§ 2201 and 2202.

COUNT III
(Breach of Contract)
(Against Acacia Research and Phillip Mitchell)

46. ConforMIS incorporates the preceding paragraphs as if fully set forth herein.

47. Acacia Research, through its agent Phillip Mitchell, entered into a contract with ConforMIS by accessing ConforMIS's online content and by registering for access to ConforMIS's Surgeon Resource Center Website. ConforMIS's Terms of Use states that "BY ACCESSING THIS WEB SITE, OR BY CLICKING A BOX THAT STATES YOU ACCEPT OR AGREE TO THESE TERMS, YOU AGREE TO THE FOLLOWING TERMS AND CONDITIONS." (Ex. B at Introduction.) The Terms of Use states that "IF YOU DO NOT

AGREE, YOU HAVE NO RIGHT OR LICENSE TO ACCESS THIS WEBSITE AND YOU SHOULD NOT DO SO.” (*Id.*)

48. ConforMIS’s Terms of Use states that the Website “is provided as an information service for knee-implant patients who are customers or potential customers of ConforMIS, and their agents or representatives, as well as the physicians, CT technologists, imaging centers and related healthcare providers who take part in such patients’ image-to-implant process,” (*id.* at ¶ 2), and that the Website “is not intended for use by any person or entity who may provide products or services that compete with any ConforMIS products and services, and is not intended for use by any User for commercial purposes whatsoever.” (*Id.*) Phillip Mitchell and his employer Acacia Research have breached the Terms of Use of ConforMIS’s Surgeon Resource Center Website and other online content by misrepresenting their identities, professions, and/or purposes and by utilizing ConforMIS’s online content and information for purposes other than those permitted under the Terms of Use.

49. ConforMIS’s Terms of Use, to which Acacia Research and its agent Phillip Mitchell agreed, expressly states that users “acknowledge that [the] Terms of Use are supported by reasonable and valuable consideration, the receipt and adequacy of which are hereby acknowledged.” (*Id.* at Introduction.) Accordingly, by accessing and viewing certain of ConforMIS’s online content and information contained in ConforMIS’s Surgeon Resource Center Website, Acacia Research, through its agent Phillip Mitchell, received reasonable and valuable consideration in agreeing to the Terms of Use, including access to information they are otherwise not entitled to, and used that information for commercial purposes.

50. ConforMIS has suffered damages as a direct and proximate result of Phillip Mitchell and Acacia Research’s breach of contract with ConforMIS.

COUNT IV
(Misappropriation of Proprietary and Confidential Business Information)
(Against Acacia Research and Phillip Mitchell)

51. ConforMIS incorporates the preceding paragraphs as if fully set forth herein.

52. To gain access to ConforMIS's Surgeon Resource Center Website, ConforMIS's Terms of Use require prospective users to acknowledge and agree that "the Site and any necessary software provided by ConforMIS and used in connection with the Site contain proprietary and confidential information that is protected by applicable intellectual property and other laws." (*Id.* at ¶ 21.) Prospective users also must agree "not to reproduce, duplicate, copy, sell, resell or exploit for any commercial purposes any portion of the Site, use of the Site or access to the Site. The Site is provided for your personal, noncommercial use only." (*Id.* at ¶ 12.)

53. By agreeing to paragraphs 12 and 21 of the Terms of Use, Acacia Research and its agent Phillip Mitchell obtained ConforMIS's proprietary and confidential business information contained in ConforMIS's Surgeon Resource Center Website.

54. Acacia Research and its agent Phillip Mitchell procured ConforMIS's proprietary and confidential business information through improper means including falsely representing that (1) they were "customers or potential customers of ConforMIS, [or] their agents or representatives, . . . [or] physicians, CT technologists, imaging centers and related healthcare providers who take part in such patients' image-to-implant process," (*id.* at ¶ 2); and (2) they were not "any person or entity who may provide products or services that compete with any ConforMIS products and services," and would not use the proprietary and confidential information "for commercial purposes whatsoever." (*Id.*)

55. Acacia Research and its agent Phillip Mitchell improperly procured ConforMIS's proprietary and confidential business information to advance their own commercial business

interests, which are adverse to ConforMIS's, including negotiating intellectual property rights with MarcTec LLC and Dr. Bonutti and providing Bonutti Skeletal with information and directing Bonutti Skeletal to bring a patent infringement action against ConforMIS in the District of Delaware.

56. ConforMIS has suffered harm as a direct and proximate result of Acacia Research's and Phillip Mitchell's improper misappropriation of ConforMIS's proprietary and confidential business information.

COUNT V
(Unfair and Deceptive Trade Practices Under Massachusetts General Law 93A)
(Against Acacia Research and Phillip Mitchell)

57. ConforMIS incorporates the preceding paragraphs as if fully set forth herein.

58. ConforMIS does business within the Commonwealth of Massachusetts, and engages in trade and/or commerce within the meaning of Chapter 93A of the Massachusetts General Laws.

59. Acacia Research engages in trade and/or commerce within the meaning of Chapter 93A of the Massachusetts General Laws.

60. On information and belief, Phillip Mitchell does not maintain a place of business and does not keep assets within the Commonwealth of Massachusetts.

61. Acacia Research and its agent Phillip Mitchell engaged in unfair and deceptive acts in the conduct of trade and caused harm to ConforMIS within the meaning of Chapter 93A of the Massachusetts General Laws.

62. Acacia Research and its agent Phillip Mitchell entered into a contract with ConforMIS in Massachusetts by registering for access to ConforMIS's Surgeon Resource Center Website, representing that they are either "customers or potential customers of ConforMIS, and their agents or representatives, as well as the physicians, CT technologists, imaging centers and

related healthcare providers who take part in such patients' image-to-implant process," and accessing ConforMIS's online content. (Ex. B at ¶ 2.)

63. Acacia Research and Phillip Mitchell never intended to honor the obligations under the Terms and Use, including the obligation that the information accessed on the Website "is not intended for use by any person or entity who may provide products or services that compete with any ConforMIS products and services, and is not intended for use by any User for commercial purposes whatsoever." (*Id.*) Instead, upon information and belief, Acacia Research and Phillip Mitchell intended to use the information it obtained from ConforMIS's Website for commercial purposes, including negotiating intellectual property terms with MarcTec LLC and Dr. Bonutti and providing Bonutti Skeletal with information and directing Bonutti Skeletal to bring a patent infringement action against ConforMIS in the District of Delaware.

64. ConforMIS has and will suffer monetary damages as a direct and proximate result of Phillip Mitchell and Acacia Research's unfair and deceptive trade practices.

COUNT VI
(Misrepresentation Under Massachusetts Common Law)
(Against Acacia Research and Phillip Mitchell)

65. ConforMIS incorporates the preceding paragraphs as if fully set forth herein.

66. On information and belief, Acacia Research and its agent Phillip Mitchell intentionally and/or negligently misrepresented that (1) they were "customers or potential customers of ConforMIS, [or] their agents or representatives, . . . [or] physicians, CT technologists, imaging centers and related healthcare providers who take part in such patients' image-to-implant process," (*id.* at ¶ 2); and (2) they were not "any person or entity who may provide products or services that compete with any ConforMIS products and services," and would not use the proprietary and confidential information "for commercial purposes whatsoever." (*Id.*)

67. On information and belief, Acacia Research and its agent Phillip Mitchell made misrepresentations to ConforMIS while knowing their representations were false.

68. On information and belief, Acacia Research and its agent Phillip Mitchell intentionally and/or negligently made misrepresentations to advance their own commercial business interests, which are adverse to ConforMIS's, including negotiating intellectual property rights with MarcTec LLC and Dr. Bonutti and providing Bonutti Skeletal with information and directing Bonutti Skeletal to bring a patent infringement action against ConforMIS in the District of Delaware.

69. On information and belief, Acacia Research and its agent Phillip Mitchell made intentional and/or negligent misrepresentations for the purpose of inducing or guiding ConforMIS to provide access to certain of ConforMIS's restricted, proprietary, and/or confidential business information.

70. On information and belief, Acacia Research and its agent Phillip Mitchell failed to exercise reasonable care or competence in communicating information regarding their identities and purposes in accessing ConforMIS's Surgeon Resource Center and other online content.

71. ConforMIS justifiably relied on Acacia Research and its agent Phillip Mitchell's intentional and/or negligent misrepresentations to its detriment and has and will suffer damages as a direct and proximate result of the misrepresentations.

PRAYER FOR RELIEF

WHEREFORE, ConforMIS respectfully requests that the Court enter judgment against Acacia Research, Advanced Skeletal, Bonutti Skeletal, and Phillip Mitchell as follows:

A. declaring that ConforMIS has not directly infringed, and does not currently directly infringe, any valid and enforceable claim of the '896 patent;

- B. declaring that ConforMIS has not jointly infringed, and does not currently jointly infringe, any valid and enforceable claim of the '896 patent;
- C. declaring that ConforMIS has not induced, and does not currently induce, infringement of any valid and enforceable claim of the '896 patent;
- D. declaring that ConforMIS has not contributorily infringe, and does not currently contributorily infringe, any valid and enforceable claim of the '896 patent;
- E. declaring that the claims of the '896 patent are invalid;
- F. enjoining Acacia Research, Advanced Skeletal, Bonutti Skeletal from asserting any patent infringement action against ConforMIS;
- G. adjudging that Acacia Research and its agent Phillip Mitchell have breached the ConforMIS Website's Terms of Use;
- H. awarding ConforMIS breach of contract damages;
- I. adjudging that Acacia Research and its agent Phillip Mitchell misappropriated business information;
- J. awarding ConforMIS damages based on Acacia Research's and Phillip Mitchell's misappropriation;
- K. adjudging that Acacia Research and its agent Phillip Mitchell engaged in unfair trade practices;
- L. awarding ConforMIS unfair trade damages;
- M. adjudging that Acacia Research and its agent Phillip Mitchell engaged in intentional and/or negligent misrepresentation;
- N. awarding ConforMIS damages based on Acacia Research's and Phillip Mitchell's intentional and/or negligent misrepresentations;

- O. finding this case exceptional under 35 U.S.C. § 285 and awarding ConforMIS its costs and reasonable attorneys' fees;
- P. awarding enhanced damages, including treble damages, attorney's fees, and costs in accordance with Chapter 93A of the Massachusetts General Laws; and
- Q. awarding ConforMIS any other such relief as is just and proper.

JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, ConforMIS hereby requests a trial by jury for all issues so triable.

Dated: February 25, 2013

Respectfully submitted,

/s/ Denise W. DeFranco

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